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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 740

In the Matter
of the
Petition of MARINA MERCANTE NICARAGUENSE, S.A., as owner of the Motor Vessel "El Salvador", in a cause of exoneration from or limitation of liability,
Petitioner,

In the Matter
of the
Petition of MCALLISTER BROTHERS, INC., as owner of the Tug "Russell No. 18" for exoneration from or limitation of liability,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF MARINA MERCANTE NICARAGUENSE, S.A.

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement	3
SUMMARY OF ARGUMENT:	
Reasons for Granting the Writ	20
Conclusion	30
APPENDIX:	
Opinion of Court of Appeals for the Second Circuit	31
Judgment of Court of Appeals for the Second Circuit	48
Order Denying Petition for Rehearing	50

TABLE OF CASES CITED

Arnold v. *Loose*, 3 Cir., 1965, 352 F. 2d 959	22
Atlee v. *N.W. Union Packet Co.*, 21 Wall. 389	26
Avera v. *Florida Towing Corporation*, 1963, 322 F. 2d 155	22, 24
Bisso v. *Inland Waterways Corp.*, 1955, 349 U.S. 85	25
Chattahooche, The, 173 U.S. 540	27
Christopher v. *Gruby*, 1 Cir., 1930, 40 F. 2d 8	22
Cleveco, The, 6 Cir., 1946, 154 F. 2d 605	22

PAGE

Halcyon Lines v. *Haenn Ship C. & R. Corp.*, 1952, 342 U.S. 282 27

Italia Societa v. *Oregon Stevedoring Co.*, 1964, 376 U.S. 315 28

Mahnich v. *Southern Steamship Co.*, 1944, 321 U.S. 96 23

McAllister v. *United States*, (1954) 348 U.S. 19, 17, 18, 19, 20, 28

Mitchell v. *Trawler Racer*, 1960, 362 U.S. 539 ... 23

Moore v. *Hecht Company*, 4 Cir., 1962, 298 F. 2d 892 22

Mound Co. v. *Texas Co.*, 1962, 5 Cir., 298 F. 2d 905, cert. den. 371 U.S. 817 22

Naumkeag Theaters Co. v. *New England Theaters, Inc.*, 1 Cir., 1965, 345 F. 2d 910 22

Publicker Industries v. *Tuyboat Neptune Co.*, 3 Cir., 1948, 171 F. 2d 48 26

Sabine Towing Co. v. *Brennan*, 1934, 72 F. 2d 490 ..... 22, 23

Salem v. *United States Lines Co.*, (1962) 370 U.S. 31 ..... 16, 19, 20, 21

Seas Shipping Company v. *Sieracki*, 1946, 328 U.S. 85 23

Sentilles v. *Inter-Caribbean Shipping Corp.*, 1959, 361 U.S. 107 21

Spencer Kellogg & Sons v. *Hicks*, 1932, 285 U.S. 502 24

United States v. *Nielson*, (1955) 349 U.S. 129 ... 10

United States Smelting Co. v. *Perry*, 8 Cir., 1909, 166 Fed. 407 21

Weyerhaeuser S.S. Co. v. *United States*, 1963, 372 U.S. 597 27

Other Authorities Cited

	PAGE
Gilmore and Black, The Law of Admiralty, pp. 701-2	23
28 U.S.C. Section 1254(1)	2
46 U.S.C.A.:	
Sections 183 et seq.	19, 22, 23, 24
Section 688	27
United States Supreme Court Rules, Rule 19(1b)	2

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Marina Mercante Nicaraguense, S.A. respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit entered July 21, 1966 modifying the judgment of the United States District Court for the Southern District of New York and the order of said Court denying rehearing entered on August 15, 1966.

Opinions Below

The Opinion of the United States District Court for the Southern District of New York is reported at 248 F. Supp. 15.* The opinion of the United States Court of Appeals for the Second Circuit is reported at 364 F.2d 118 (infra, pp. 31-47). The order denying the petition for rehearing is printed in the appendix hereto, infra, p. 50.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 21, 1966 (infra, pp. 48-49). Rehearing was denied on August 15, 1966 infra, p. 50. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Rule 19(1b) of this Court.

Questions Presented

(1) Whether a trier of the facts is compelled to accept the opinion of an expert merely because it is not contradicted by other expert testimony though in conflict with the testimony of fact witnesses.

(2) Where a shipowner owns a vessel which has a list because a new engine and auxiliaries which are larger and more powerful than those for which the vessel was built is installed off center, is he entitled to limit his liability or be exonerated therefrom merely

* A copy of the opinion appears at pp. 95a-145a of petitioner Marina's appendix certified by Clerk of Court of Appeals.

because he informed the crew of the vessel what they should do to compensate for the malplacement of the engine and there is substantial but not complete correction?

(3) Where a tug company furnishes a pilot and tug to assist in the shifting of a vessel, does the pilotage clause insulate the tug company from liability which is brought about by the pilot's ignorance of the speed capability of the tug and his unfamiliarity with the waters in which he is to navigate, particularly the identity and location of the navigational aids?

(4) Whether the doctrine of last clear chance is applicable in admiralty when the negligence of both parties substantially contributes to the sinking of a vessel but it is the opinion of an appellate Court that the negligence of one is of a lower degree than that of the other.

(5) Whether income taxes are deductible from earnings in death cases in determining the reasonable expectation of pecuniary support of which the beneficiaries have been deprived.

Statement

This litigation arises out of the capsizing and sinking of the Tug "Russell 18" in a matter of two or three minutes in the quiet and calm waters of Port Elizabeth Channel on the early morning of September 20, 1962. The "Russell 18" had completed assisting the Motor Vessel "El Salvador" to undock from her berth at a pier in Port Elizabeth, New Jersey and was run-

ning alongside the "El Salvador," under her own power, performing no function. The tug's hawser which ran from the tug's forward bitt to a cleat just aft of the "El Salvador's" forecastle head and which had been used to assist the "El Salvador" to turn into the Port Elizabeth Channel was left in its original position.

It was undisputed that the "Russell 18" was 78.5 feet long and that the "El Salvador" was 357 feet long and that as the ship and tug proceeded up the Port Elizabeth Channel toward its junction with Newark Bay Channel which was to be entered by a turn to starboard, the "Russell 18" was on the port side of the "El Salvador" with the bow of the tug against the side of the "El Salvador" aft of the "El Salvador's" forecastle head, the tug's pilot house forward of the ship's bridge and its stern about four feet from the side of the ship.

It was undisputed that immediately on falling in alongside the "El Salvador," the "Russell 18" began to list to port and that the list increased as the two vessels proceeded up the Port Elizabeth Channel side by side, with the line from the tug still attached though not needed for passage up the channel. It was further undisputed that the draft of the "Russell 18" was 9½ feet and that of the "El Salvador" 15′ 9″ aft; that during this passage no one aboard the "Russell 18" felt or heard any contact with anything and that no one aboard the "El Salvador" was aware that the "Russell 18" was in any difficulty until the "El Salvador's" bosn discovered the tug's line to the vessel under a heavy strain, the tug listing heavily to port, water going over her and several men

on the bulwark of the tug yelling excitedly. Sensing a situation of danger, the bosn cut the line. Instead of the tug righting itself, as the bosn believed it would, it continued to list as it drifted free of the "El Salvador" and capsized and sank. As a result, three of the tug's crew of the seven then aboard lost their lives by drowning. It is also undisputed that Fargo, the Mate who was at the wheel of the tug during the undocking and during its transit up Port Elizabeth Channel, was the only deck officer aboard the tug for some 23 consecutive hours prior to the disaster. The Master of the tug had not returned on the previous day as scheduled to take over the command of the tug. Furthermore, according to the tug's deckhand, the tug's Mate had ordered him to let go the line and he did so at or about the time the bosn cut the line on the ship.

During the undocking operation and during the course of its passage up the channel, the "El Salvador" was under the conn of a pilot who was employed by McAllister solely as a docking pilot. He was not attached to any tug. McAllister had furnished this pilot for the express purpose of piloting the "El Salvador" in shifting that vessel from its berth at Port Elizabeth to a pier in Brooklyn, New York.

Petitions for exoneration from or limitation of liability were filed by owners of both vessels pursuant to 46 U.S.C. 183 et seq. McAllister Brothers, Inc., herein referred to as McAllister petitioned as owner of the Tug "Russell 18." Marina Mercante Nicaraguense, S.A., herein referred to as Marina, petitioned as owner of the "El Salvador." Representatives of the three deceased crew members filed claims in each proceeding, contesting the right to limitation or exoneration.

Each petitioner challenged the right of the other to limitation and exoneration and in the event it was cast in liability to the death claimants, sought indemnity from the other. McAllister also filed a claim in Marina's limitation proceeding seeking recovery of damages to the "Russell 18."

The two petitions were consolidated and tried together by the Court without a jury. The Trial Court found that both vessels, the "Russell 18" and the "El Salvador," by their negligent acts and conduct substantially contributed to the tug's sinking and that each bore responsibility for the casualty. Exoneration was, therefore, denied. The Trial Court, however, held that the faults attributable to each were faults in seamanship and navigational conduct which occurred without the privity or knowledge of their owner and limitation of liability was allowed to each petitioner.

The "Russel 18" was held at fault because, on the morning of the capsizing, she was found to be unstable and readily susceptible to an unusual list. Notwithstanding the fact that the instability had its inception in the malplacement of the tug's engine and auxiliaries and on the morning of the disaster sufficient fuel had not been maintained in the tug's wing tanks to compensate for this added weight and there was an accumulation of fuel in the tug's lazarette from a leak which had been discovered and reported to McAllister's Port and Assistant Port Engineer some six weeks prior to the casualty, the Trial Court held that these faults were without the privity or knowledge of McAllister because the tug's crew were fully informed and knew that the instability resulting from the malplacement of the tug's engine and auxiliaries could be

readily corrected by maintaining liquid ballast in the tug's wing tanks in required proportions and because the tug's crew were negligent in failing to pump out the fuel which had accumulated and was permitted to remain in the lazarette though they had no pump with which to pump it out.

The Trial Court found the "El Salvador" at fault on the basis of the speculations of a naval architect produced by McAllister that the mud and other damages found on the tug four days after it was raised, in the expert's opinion, indicated contact with a bank. On cross-examination, the expert, however, had conceded that he had no familiarity with the configuration of the Port Elizabeth Channel and that admittedly the mud could have come either from the bottom or a bank in the channel. It disregarded the testimony of employees of the Port of New York Authority, which had constructed the channel and was maintaining it at the time in question, that there was no bank on the port side of the channel. The Trial Court held that petitioner Marina's failure to call the surveyors or experts who examined the "Russel 18", on its behalf, after the tug had been raised for the purpose of ascertaining the extent of the damages and to estimate the cost of repairs, permitted the inference that if called, their testimony would corroborate McAllister's naval expert's opinion. Reasoning from this premise, the Trial Court also disregarded the positive and otherwise uncontroverted testimony of the Master of the "El Salvador" as well as the pilot that whenever they checked the course of the "El Salvador" they found her to be in the middle of the channel and charged the "El Salvador" with faults involving, on

the one hand, the conduct of the Master, Chief Officer and Bosn and, on the other, that of the pilot.

According to the Trial Court, the pilot's negligence consisted of: (1) stationing himself on the "El Salvador's" bridge, outside the wheelhouse some 25 feet from the ship's wheel and, in the darkness, looking for a black can buoy which he intended to use as a guide in turning from Port Elizabeth Channel into the Newark Bay Channel and which buoy he knew was not on station and for which he searched before boarding the "El Salvador"; (2) without knowing whether the "Russel 18" could keep pace with the full speed of the "El Salvador" and while still searching in vain for the black can buoy on the starboard wing in ordering the "El Salvador" on full speed ahead without signaling to the tug; (3) while still on the starboard wing, searching for the black can buoy, not knowing the distance between the "El Salvador" and the port bank of the channel or whether the wheelsman was keeping the course he had set, ordering a hard astarboard turn to effect his entrance into Newark Bay Channel, again without signal to the "Russell 18"; (4) failing to use the ship's search light to assist in looking for the black can buoy which would have permitted him to remain at his normal station outside the wheelhouse; and (5) in failing to use the "El Salvador's" instruments to set and check the course but piloting the "El Salvador" by referring to shore lights, some of which he could not identify and to the red can buoys to port, to which he admittedly did not know the distance.

The Master of the El Salvador, who was on the bridge during the undocking and subsequent passage

up Port Elizabeth Channel, was charged with negligence because he did not countermand the pilot's full speed and starboard turn orders.

The bosn of the "El Salvador" was charged with negligence because he cut the line from the tug to the "El Salvador" after notifying his immediate superior, the Chief Mate, instead of first notifying the bridge notwithstanding the fact that when the tug's plight was discovered, the line from the tug to the ship was under a heavy strain; the tug was listing heavily to port, water going over her and several men on the bulwark of the tug were yelling excitedly and he acted because he sensed a situation of danger and believed that the tug, if free, would right itself. The Chief Mate was charged with negligence because, under these circumstances, he exercised his discretion and permitted the bosn to cut the line instead of waiting and notifying the bridge.

Petitioner Marina's claims that the pilot's conduct, in conducting the search for the black can buoy after boarding the "El Salvador"; his ignorance of the speed capability of the "Russell 18"; his attempt to pilot the "El Salvador" by referring to shore lights, some of which he could not identify and the red can buoy to which he did not know the distance rather than using the "El Salvador's" navigational instruments and his failure to signal change of speed and change of course and the consequences resulting therefrom were pre-boarding errors and/or not within the terms or meaning of the pilotage clause, were dismissed by the Trial Court on the sole ground that they did not support a claim of incompetency as the pilot

furnished was a licensed pilot with seventeen years of experience in New York waters plus additional experience at sea. Petitioner Marina's claim that McAllister breached its warranty of fitness by providing an unstable tug was also denied because, according to the Trial Court, it resulted from the negligence of the tug's crew in failing to compensate properly for the malplacement of the tug's engine and in failing to pump out the accumulation in the lazarette and, therefore, was without the privity or knowledge of McAllister and because petitioner Marina could not participate with the death claimants in McAllister's inadequate limitation fund.

McAllister's claim for indemnity against Marina for its liability to the death claimants and for damages to the tug also was denied. Recovery of damages required to be paid to the death claimants was held to be precluded because the negligent conduct of the crewmembers of the "Russell 18" substantially contributed to and were a causative factor of the tug's sinking. Damages to the tug were denied on the authority of *United States* v. *Nielson,* (1955) 349 U.S. 129, 131 where it was held that in the absence of clear contractual language a person supplying his own employee to another in a common undertaking usually cannot collect damages arising from the negligent conduct of the employee supplied.

Due to the fact that McAllister's limitation fund was not adequate to permit an equal assessment of damages against both petitioners and Marina's fund was in excess of its share under an equal proportion, the Trial Court directed petitioner, Marina, to

pay the balance of the awards remaining after McAllister's fund was exhausted.

All parties appealed. The death claimants criticized the awards because in determining the reasonable expectation of pecuniary support of which the beneficiaries had been deprived, the Trial Court adjusted the income by deducting therefrom an allowance for taxes.

Petitioner, Marina, urged that the decree of the Trial Court was in error because: (1) the Trial Court's finding that the "Russell 18" came in contact with an alleged bank was contrary to the undisputed physical facts and based on pure speculation unsupported by competent or probative evidence; (2) the Trial Court was in error in extending the terms of the pilotage clause to include pre-boarding errors as well as conduct not within the intent or meaning of the pilotage clause; (3) the Trial Court was in error in holding that McAllister could delegate the duty of providing a seaworthy and stable tug to the crew of the vessel and that, therefore, the faults of the tug were not without the privity or knowledge of McAllister notwithstanding the fact that they had existed for some time prior to the capsizing and the "Russell 18" was not properly equipped; (4) that McAllister, in any event, was not entitled to limit its liability to the value of the tug for the negligence of the pilot who was not attached to and was not a member of the crew of the tug; (5) that under the circumstances, neither petitioner Marina nor its Master, Chief Mate or Bosn were negligent and (6) that petitioner Marina was entitled to indemnity because McAllister breached its warranty to provide a seaworthy tug regardless of

privity or knowledge and a competent, knowledgeable and sufficiently skilled pilot.

McAllister disputed the validity of petitioner Marina's contentions and, in turn, claimed, notwithstanding the Trial Court's findings that the "Russell 18" had a port list because of the malplacement of its engine and the improper ballasting and the accumulation of fuel in the lazarette from a leak, it was adequate for the service for which it was furnished and that, in any event, such instability, as existed, resulted from the crew's negligence to whom the duty of making the "Russell 18" stable and seaworthy was delegated and, therefore, was without McAllister's privity or knowledge. It further contended that the "El Salvador's" Bosn and First Mate had the last clear chance to save the "Russell 18" and that, therefore, the sole proximate cause of the sinking of the "Russell 18" was their failure to notify the ship's bridge of the tug's plight before cutting the line notwithstanding the fact that the tug was required to have a deckhand standing at the line in order to let it go or cut it if an emergency arose and it was McAllister's practice that the tug take care of itself and for the pilot not to signal a change of course or speed. In respect to the search of the pilot for the black can buoy, instead of piloting the "El Salvador" properly, McAllister sought to avoid the consequences of this negligence by claiming that since there was no proof that at the time other pilots or navigators were aware that the black can buoy was not on station it was not negligent notwithstanding the fact that the Court below had found that McAllister's pilot had this knowledge. McAllister further contended that under the pilotage clause it was insulated

from all liability arising from the faults of the pilot whether concerned with the handling of the ship and the giving of orders to the tug as defined by the pilotage clause or not because, on boarding the "El Salvador", the pilot became the servant of the shipowner and petitioner was liable without regard to whether or not he had the skill or knowledge to perform the service for which he was provided or was performing the service being paid for.

McAllister sought to dismiss the pilot's admitted ignorance of the speed capability of the "Russell 18" by urging that what the Trial Court really meant was not his unfamiliarity with the tug but the speed capability of the "Russell 18" in its relation to the conditions existing in the channel as they applied to the "El Salvador" under the prevailing conditions including where it was to be navigated and the effect thereof on the "Russell 18" rather than whether or not the "Russell 18" was fit for the service for which it was provided.

The Court of Appeals recognized the validity of petitioner's basic argument that the naval architect's opinion did not afford a competent basis for a finding that there was a bank on the port side of the Port Elizabeth Channel which petitioner contended was the basic premise that resulted in the Trial Court making the erroneous finding that the "El Salvador" was negligent in navigation. It said:

> "The only criticism calling for comment stresses the testimony of an employee of the Port of New York Authority that four buoys on the tug's port side were in 35′ of water—thus making it impos-

sible for the tug to run aground. * * *" (p. 34, infra)

The Court of Appeals, however, held that it was proper to reject this testimony because it was contradicted by the testimony of yet another expert witness. It said:

> "* * *. But this evidence was contradicted by a tug captain who testified that the buoys lay outside the navigable channel in shallow water and that the tug would touch bottom if it was parallel to a buoy and 30′ away." (p. 34, infra)

In so doing, the Court of Appeals ignored the fact that, like the expert on naval architecture, this expert conceded on cross-examination that his testimony was based on pure hearsay; that it was based on what someone had told him when a tug of his company had run aground while attempting to enter the Port Elizabeth Channel while this witness was on vacation; that he had no personal knowledge of the channel area in question and, in fact, understood that a vessel with as much as a 31 foot draft could be taken into the Port Elizabeth Channel (R. 718, 998; 999, 1005, 1007). It is undisputed that at the relevant time the draft of the "Russell 18" was 9½′ and that of the "El Salvador" 15′ 9″ aft.

Not seeing any incongruity in the "El Salvador" not touching bottom with a draft of 15′ 9″ while the "Russell 18" alongside with a draft of 9½′ would be touching bottom and the fact that, while alongside, the stern of the "Russell 18" would have to be considerably forward of the "El Salvador's" stern, the Court of Appeals held the findings were not clearly

erroneous and that the Trial Court was clearly justified in adopting an explanation consistent with the reported facts and backed by expert opinion, although when located following the sinking, the "Russell 18" was found resting on the bottom on the opposite side of the Port Elizabeth Channel some 900 feet from the phantom bank which she allegedly struck and then sank quickly, stern first.

Thereafter, apparently feeling that the Trial Court had not accorded other expert testimony the weight which it would have accorded such testimony had it been the trier of the facts, the Court of Appeals proceeded to reexamine the Trial Court's findings relating to the stability of the "Russell 18." It held that on the basis of its "own common understanding" the faults of the "Russell 18," whether characterized as negligence or unseaworthiness, would not constitute a sine qua non cause of the sinking (p. 40, infra). In reaching this conclusion, the Court of Appeals rejected the Trial Court's finding that the "Russell 18" developed a severe port list and was taking on water *before* she struck the non-existent bank and held that the "Russell 18" had developed a heavy list to port *after* impact with the mud bank, after the speed of the "Russell 18" had been slowed by the digging of her propeller in the bank and after she had been dragged through the ship's starboard turn (p. 33, infra). Further, while professing adherence to the Trial Judge's findings as to the circumstances of the accident, the Court of Appeals rejected the Trial Court's findings that the instability and ready susceptibility of the "Russell 18" to an *unusual* list, substantially contributed to the sinking on the ground that the quantity of fuel in the tanks though not up to the re-

quired proportion constituted *substantial correction* and since petitioner had not produced any expert to counter McAllister's evidence on the effect of this condition, the Trial Judge was in error in speculating what effect this deficiency had on the stability of the tug (p. 38, infra).

Further, while conceding that the testimony was in conflict as to the amount of fuel which had accumulated in the lazarette from a leak, it rejected the Trial Court's finding that singly this factor could have rendered the "Russell 18" unstable and susceptible to an unusual list by noting that, according to the naval architect, the accumulation was only 37 gallons and not 100 as estimated by the tug's Chief Engineer. Accordingly it concluded that the effect was minimal.

The Court of Appeals justified its redetermination of the findings below on the effect of the faults of the "Russell 18" on the ground that this Court's decision in *Salem* v. *United States Lines Co.*, (1962) 370 U.S. 31 did not mean that a party should always succeed without expert evidence in cases which might be said to touch upon naval architecture especially when one's adversary provided some (p. 39, infra). In so doing, it overlooked the fact that there was other testimony in the case including that of McAllister's expert that liquid ballast was not unsafe "provided the vessel was kept on an even keel by proper manipulation of fuel or ballast" (R. 1375, 1376) and his admission that when he conducted the stability test subsequent to the sinking, the "Russell 18" still had a list to port even though her lifeboat and davits had been removed from the port side, a heavier generator had been installed on the starboard side in the tug's engineroom and

there was no water in the fresh water tank, and the ballast tank forward and no liquid in either the lazarette or bilges (R. 1384).

Then, professing adherence to the rule of *McAllister* v. *United States,* (1954) 348 U.S. 19 and stating that it was unnecessary to determine whether the rule of that case would forbid reversal of the finding of causal relationship, the Court of Appeals set aside the finding that the tug was at fault on the ground that the half damage rule did not apply to this case because it believed that McAllister was guilty only of a rather low degree of negligence. Obviously, proceeding on the incorrect premise that the severe port list of the "Russell 18" developed as a result of contact with a bank and being dragged through mud, the Court of Appeals held that this case fell within the line of cases "where the vessel committing the latter fault was contractually bound to care for the one guilty of an earlier fault". It completely overlooked the fact that the "Russell 18" was self-propelled and not a towed barge or vessel and that, under McAllister's practice, the "Russell 18" was charged with the duty of taking care of itself. Disregarding this and the fact that the "Russell 18" was also required to have a deckhand standing by the line to release it if an emergency arose, the Court of Appeals charged that the "El Salvador's" bosn and Chief Mate had the last clear chance to save the tug and that this would have been the result if they had notified the bridge notwithstanding the fact that when the bosn discovered the tug's plight the list of the tug was increasing rapidly and she was taking on water. It also disregarded the fact that, at or about the time the bosn cut the line, the

tug's deckhand had, in fact, received orders from the mate of the "Russell 18" to let go the line and the mate had blown the tug's whistle notifying the pilot that the line was let go.

In fact, the Court of Appeals conceded that in exonerating McAllister under the Last Clear Chance Doctrine, it was not considering all the faults which the Trial Court found were committed. After holding that the conduct of the bosn and Chief Mate was a serious fault, it said:

> "* * *. It is unnecessary to pass upon the judge's conclusion that still other faults were committed, since these suffice for disposition of the case." (p. 36, infra).

A determination must rest on all the facts and not only those which are selected out to support a desired result in the case.

Finally, while the Court of Appeals conceded that the Trial Judge made a painstaking computation of the damages and that the Trial Judge had discretion, particularly in a non jury case to determine, whether in view of the wage earner's income and status, the failure to deduct taxes would result in an award that would be plainly excessive, it rejected the awards as, in its view, the deductions were improper because it did not believe that tug boat workers in New York harbor should be considered among those high income earners to which the income tax exception applied.

Petitioner moved for a rehearing. The petition was denied by the majority, one judge abstaining (p. 50, infra).

SUMMARY OF ARGUMENT

The Court of Appeals did not hold that the Trial Court's findings were clearly erroneous, but simply substituted its judgment for that of the Trial Judge. It sought to avoid the rule of *McAllister* v. *United States,* 348 U.S. 19 by interpreting this Court's decision in *Salem* v. *United States Lines Co.,* 370 U.S. 31 as an exception to that rule and a device by means of which it could substitute the opinions of experts for the testimony of fact witnesses merely because the expert testimony was not contradicted by another expert. On the issue of liability, it so construed the Limitation of Liability Act (46 U.S.C.A. 183 et. seq.) that it relieved the shipowner of practically all responsibility and shifted the burden of providing a seaworthy vessel to its crew. In fixing responsibility, it adopted the practice of ignoring those faults which were not consistent with the view of the case which it preferred and substituted the last clear chance doctrine for the admiralty rule of divided damages by rejecting the Trial Court's findings on causal relation.

The Court further construed the pilotage clause as an exemption of all conduct whether within the contemplation of the parties or not and extended it so that it included the negligence or breach of duty of the employer and supplier of the pilot as well.

Damages, according to the Court of Appeals, depended on whether the income of the decedent was to be considered high or not, and not on a computation of pecuniary loss.

The questions here are substantial and are of national importance and involve the rights of many litigants in a great bulk of litigation whether they be plaintiffs or defendants and whether they concern injury claims or other types of claims. They involve not only rules of evidence but basic rights of liability and responsibility under the law as well as construction of agreements and damages and the rules governing damages.

Reasons for Granting the Writ

1. In setting aside the findings of the Trial Court that the "Russell 18" was unstable and readily susceptible to an *unusual* list and that these faults substantially contributed to the sinking of the "Russell 18", the Court of Appeals evolved a novel rule of evidence which placed expert testimony beyond the reach of this Court's decision in *McAllister* v. *United States,* 1954, 348 U.S. 19 and made the calling of expert witnesses dependent on whether or not one's adversary produced an expert and not upon the need of expert testimony. It did so because it completely misinterpreted this Court's decision in *Salem* v. *United States Lines Co.,* 1962, 370 U.S. 31, 35 when it stated:

> "The Supreme Court's disapproval of the 'broad proposition' that 'claims which might be said to touch upon naval architecture can never succeed without expert evidence,' Salem v. United States Lines Co., 370 U.S. 31, 35 (1962), does not mean that a party can always succeed without it, especially when his adversary has provided same." (p. 39, infra).

This Court, however, was explicit in *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 that neither reason nor authority supported the proposition that negligence or unseaworthiness claims, which might be said to touch upon naval architecture, could not succeed without expert testimony. According to this Court, the necessity and admissibility of expert evidence was dependent on whether the primary facts could be accurately and intelligently described to the jury and whether they were competent to determine the issues and it is the trier of the facts who has the discretion to accept or reject expert opinions and not the Appellate Court. It also is the "common understanding" of the triers of the facts which controls and about which the Court speaks in *United States Smelting Co.* v. *Perry,* 8 Cir., 1909, 166 Fed. 407, 415 and not that of the Appellate Tribunal, as the Court of Appeals seems to believe.

Where, as here, the facts are in dispute and there is evidence to support the findings, the Court of Appeals is not free to reweigh the evidence and set aside the findings below merely because different inferences or conclusions could have been drawn or because the Appellate Tribunal feels that other results were more reasonable. *Sentilles* v. *Inter-Caribbean Shipping Corp.,* 1959, 361 U.S. 107, 110. Speculation is not reversible error merely because it does not accord with the Appellate Tribunal's view of the case.

Review by this Court is, therefore, required because the Court of Appeals has applied an improper standard in reviewing the evidence in this case and the rule applied conflicts not only with decisions of this

Court but such decisions as *Mound Co.* v. *Texas Co.*, 1962, 5 Cir., 298 F.2d 905, 910 cert. den. 371 U.S. 817; *Moore* v. *Hecht Company*, 4 Cir., 1962, 298 F.2d 892, 893; *Naumkeag Theaters Co.* v. *New England Theaters, Inc.*, 1 Cir., 1965, 345 F.2d 910, 914 and *Arnold* v. *Loose*, 3 Cir., 1965, 352 F.2d 959, 963. These decisions are consistent in holding that the Trial Court is not bound by opinion evidence of experts even when uncontradicted. As a result of this decision, however no litigant could afford to risk litigating his case on the facts if his adversary elected to litigate the issues with expert opinions.

2. The decision of the Court of Appeals, in modifying the decision below and granting exoneration to the "Russell 18", also violates the intent and purpose of the Limitation of Liability Act, 46 U.S.C.A. 183 et seq. and is in conflict with the decisions of the Fifth Circuit in *Sabine Towing Co.* v. *Brennan*, 1934, 72 F.2d 490 and *Avera* v. *Florida Towing Corporation*, 1963, 322 F.2d 155, the First Circuit in *Christopher* v. *Gruby*, 1930, 40 F.2d 8 and the Sixth Circuit in *The Cleveco*, 1946, 154 F.2d 605.

These cases are consistent in holding that a shipowner cannot obtain exoneration from liability under the Limitation of Liability Act for failure to make a ship seaworthy, particularly in a matter as important to the members of the crew as its stability, by delegating that duty to the crew.

In speaking of the owner's duty to make the vessel seaworthy, the Court in *Sabine Towing Co.* v. *Brennan*, 72 F.2d 490, 494, said:

> "This duty, as to injuries, for which the general maritime law provides recovery, is absolute. Its breach without regard to negligence makes the owner liable for such losses. * * *"

This concept is in conformity with this Court's holdings in such cases as *Seas Shipping Company* v. *Sieracki*, 1946, 328 U.S. 85; *Mahnich* v. *Southern Steamship Co.*, 1944, 321 U.S. 96; and *Mitchell* v. *Trawler Racer*, 1960, 362 U.S. 539 where it has been unequivocally held that the basic duty to provide a seaworthy vessel cannot be avoided by delegating it to another. See also *Gilmore and Black, The Law of Admiralty,* pp. 701-2.

Significantly, in damage to cargo cases, where due diligence is recognized as a defense, failure to load a vessel properly is a failure to exercise due diligence and no delegation of the duty to the Master, subordinate employee or independent contractor protects the owner from liability. *Gilmore and Black, The Law of Admiralty,* p. 701.

Even assuming that, under the Limitation of Liability Act, the duty to make the "Russell 18" seaworthy could be delegated, the Court below erred in granting limitation and exoneration. Here McAllister operated its tug in local waters. It is charged with knowledge not only of what its managing officers and supervisory personnel know but with what they would have known had they made a proper and reasonable inspection. There is no analogy between this case and cases where the vessel is plying the high seas

and the owner must rely on the Master and crew to maintain the vessel in a seaworthy condition. *Avera* v. *Florida Towing Corporation*, 5 Cir., 1963, 322 F.2d 155, 165; *Spencer Kellogg & Sons* v. *Hicks*, 1932, 285 U.S. 502, 511, 512.

In granting exoneration because "substantial correction had been made", the Court of Appeals further restricted the Limitation of Liability Act. Under this concept, exoneration and limitation are made dependent not on whether the vessel is safe and seaworthy but on whether steps were taken to try to make it so without regard to whether they were proper or not. The standard however is reasonable fitness and not whether it amounted to substantial correction.

This question therefore requires review by this Court because the decision below places an unwarranted restriction on the Limitation of Liability Act and permits the tugowner to escape responsibility by shifting the safety of the vessel to those who are required to work upon it and penalizes them if they do not exercise more care than the owner could ordinarily exact at their peril.

3. In holding that the pilotage clause completely insulated McAllister from any liability and entitled it to recover half of the damages sustained by the "Russell 18" even though the "acts of Skogen (the pilot) were the prime cause of the tragedy" (p. 42, infra), the Court of Appeals misconstrued the terms of the pilotage clause and extended to McAllister a protection not contemplated or provided for in the pilotage clause.

According to the pilotage clause, the pilot:

> "* * * becomes the servant of the owner of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, charterers, operators or managers shall be liable for any damage resulting therefrom." (ftn. 3, p. 36, infra).

While this clause exempts McAllister from damage resulting from the pilot's "giving of orders to the tug" and "in respect to the handling of such vessel", it was not intended to exempt McAllister from all negligence whether committed by the pilot before coming aboard and taking over the "El Salvador" or McAllister's own negligence for failing to provide a sufficiently skilled, knowledgeable and competent pilot, or for failing to provide a seaworthy tug.

It is hornbook law that exculpatory clauses must be strictly construed against the party preparing them. They will not be extended to cover conduct unless it is conduct clearly defined by the clauses seeking exculpation. As this Court pointed out in *Bisso* v. *Inland Waterways Corp.*, 1955, 349 U.S. 85, 93, the reason why pilotage exemptions have been held valid and towage exemptions invalid is because the pilotage clause exempts for negligence of pilots only, while the towage clause exempts from all negligence of all towage employees.

The pilotage clause, therefore, was improperly extended to cover not only the negligence of McAllister but that of the pilot committed before he came aboard which, the Court correctly held in *Publicker Industries* v. *Tugboat Neptune Co.*, 3 Cir., 1948, 171 F.2d 48, 49-50, was properly chargeable only to McAllister, the general employer.

McAllister, in this case, was engaged in the business not only of providing tug services but pilotage. The pilot provided to the "El Salvador" was not the tug Captain of the "Russell 18" but a special employee of McAllister maintained on its payroll for the specific purpose of piloting vessels. He thus was not aboard purely for convenience but to provide a specialized service for which petitioner was required to pay a fee. As such, he not only had to be familiar with the tug which was assigned to work with him, but, as this Court pointed out in *Atlee* v. *N.W. Union Packet Co.*, 21 Wall. 389, 396, he had to know not only the area through which he was to steer the vessel but had to be familiar with the aids to navigation and the landmarks which he used in his work. Any faults resulting from such a lack of knowledge, skill or competence clearly was not within the contemplation of the pilotage clause.

This question warrants review by this Court because under the decision below, a tugboat company could obtain exemption under the pilotage clause for the conduct of any one it elects to provide whether or not he had the necessary qualifications for the job or the services paid for are provided or not.

4. In holding that McAllister was entitled to exoneration under the last clear chance doctrine, the Court of Appeals misapplied that doctrine to the facts of this case and disregarded the rule of admiralty law which, for more than one hundred years, has governed the correlative rights and duties of two shipowners whose vessels had been involved in a collision in which both were at fault. It also rejects the rule that McAllister as the employer cannot escape liability under the Jones Act (46 U.S.C.A. 688) if its negligence played any part in causing the casualty.

This Court was explicit in *Halcyon Lines* v. *Haenn Ship C.&R. Corp.*, 1952, 342 U.S. 282, 284 and *Weyerhaeuser S.S. Co.* v. *United States*, 1963, 372 U.S. 597 that in the absence of Congressional action the Courts were not free to fashion new rules of damages based on degree of fault. It would seem that if the divided damage rule prevails over a statutory provision like that involved in *Weyerhaeuser S.S. Co.* v. *United States*, supra, and that in *The Chattahooche*, 173 U.S. 540, a Court fashioned rule such as the last clear chance doctrine may not be applied, even if utilized selectively, to free a claimant from the consequences of his own negligence whether the negligence is of a low degree or not. The divided damage rule is based upon the duty which each shipowner owes to the other to navigate safely and if the negligence or fault of one in any way contributes to the casualty, the half damage rule applies regardless of the degree of negligence or fault or whether or not the fault of one was earlier than that of the other.

This question requires review by this Court, however, not only because it rejects the half damage rule

but because in rejecting this rule, the Court of Appeals admittedly did not consider all the faults which were found by the Trial Court to have been committed by McAllister and which faults were held to have contributed substantially to the casualty.

The selective utilization of the doctrine of last clear chance does not warrant its application just to selected faults. Nor can this doctrine be applied where the prime cause of the tragedy is the acts of the McAllister pilot without examination of these acts to determine whether they fall within or without the terms of the pilotage clause. If the decision below is permitted to stand, it will be not only a clear repudiation of the rule in *McAllister* v. *United States,* 1954, 348 U.S. 19, but a repudiation of this Court's objectives to minimize the hazards by placing responsibility upon the party best situated to adopt preventive measures and thereby reduce the likelihood of injury. *Italia Societa* v. *Oregon Stevedoring Co.,* 1964, 376 U.S. 315, 324.

5. On the damage awards, the Court of Appeals disallowed deductions for income taxes on the unrealistic ground that the question whether income taxes should be deducted or not was dependent solely on whether the decedent could be considered a high-wage earner or not. In so doing, it overlooked the fact that in its computation, the Trial Court considered advancement of position, increased wage rates as well as the hazards of economic dislocation, unemployment, reduced earning capacity by reason of age and other adverse factors. Elaborate charts were submitted on behalf of all of the claimants setting forth a detailed projection over the work expectancy period. As the charts set forth in the Trial Court's opinion demon-

strate, minimum amounts were deducted to cover taxes and personal expenses of the decedents. This, according to the Trial Court, was based upon the evidence in each case, practical experience and common sense.

The Court of Appeals was thus in error in the absence of an abuse of discretion by the Trial Court and a showing that the damage awards were inadequate, in disallowing the tax deduction. Its holding is inconsistent with the law, the purpose of which, is to allow damages for pecuniary losses suffered and not to penalize the wrongdoer. To ignore taxes in the present day is to be out of touch with reality. In many instances wage scales today are based, to a great extent, on the net return to the wage earner. If any under compensation for loss of earning power results, the Trial Court has the power to set aside the verdict on the ground that it is inadequate.

This question warrants review by this Court because it affects a great deal of litigation which is pending in the Courts all over the nation. It should be resolved to eliminate the uncertainty which the Court of Appeals and the Trial Court, in their opinions, indicate exists as to whether actual pecuniary loss is to be predicated on net income or on whether the earnings are in the high or low income bracket.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
October 31, 1966

Respectfully submitted,

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VICTOR S. CICHANOWICZ
and
WILLIAM P. LARSEN
On Petition

Opinion of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 384—September Term, 1965.

(Argued May 24, 1966 Decided July 21, 1966.)

Docket No. 30306

In the Matter of the Petition of MARINA MERCANTE NICARAGUENSE, S.A., as owner of the Motor Vessel "EL SALVADOR", for exoneration from or limitation of liability,

Petitioner-Appellant-Appellee.

In the Matter of the Petition of MCALLISTER BROTHERS, INC., as owner of the Tug "RUSSELL No. 18" for exoneration from or limitation of liability,

Petitioner-Appellee-Appellant.

Before:

FRIENDLY, HAYS and FEINBERG,

Circuit Judges.

Appeals from a final decree of the District Court for the Southern District of New York, Edward Weinfeld, *Judge,* 248 F. Supp. 15 (1965), finding a

ship owner and a tug owner liable for the deaths of three crewmen in the sinking of the tug, and denying claims for indemnity and for damage to the tug. Decree modified.

VICTOR S. CICHANOWICZ (Cichanowicz & Callan, New York, N. Y.; Stanley R. Wright, William P. Larsen, of Counsel), *for Marina Mercante Nicaraguense, S.A.*

CHRISTOPHER E. HECKMAN (Foley & Martin, New York, N. Y.; Thomas J. Irving, of counsel), *for McAllister Brothers, Inc.*

THOMAS E. P. MCELLIGOTT (Fields, Rosen, McElligott & Auslander, New York, N. Y.), *for Claimant, Virginia Ruth Evans.*

JOHN J. PURCELL (Lilly, Sullivan & Purcell, New York, N. Y.; Frank C. Mason, of Counsel), *for Claimant, Catherine Marie Fargo.*

MARTIN J. MCHUGH (Mahar & Mason, New York, N. Y.), *for Claimant, Theresa F. Salvesen.*

FRIENDLY, *Circuit Judge*:

In a typically thorough opinion, 248 F. Supp. 15 (1965), to which we refer for a full account of the facts, Judge Weinfeld in the District Court for the Southern District of New York found Marina Mer-

cante Nicaraguense, S.A., owner of the M/V "El Salvador", and McAllister Brothers, Inc., owner of the Tug "Russell 18", liable for the deaths of three crewmen drowned when the tug sank in the Port Elizabeth Channel in New Jersey on September 20, 1962. He allowed the death claims in an aggregate of $406,175, directed payment first out of the tug's limitation fund of $70,000 and then out of the "El Salvador's" fund of $535,172, denied McAllister's claim for damage to the tug, and dismissed Marina's and McAllister's claims for identification from each other. All five parties have appealed, the death claimants criticizing the awards as insufficient and each owner seeking to place the entire blame on the other.

I.

The judge found that the "El Salvador" caused the "Russell 18" to strike a mud bank on the northerly side of the Port Elizabeth Channel when, with the tug's line secured to her port side, she put on full speed ahead and, moving through the water at 7 knots, threw her helm hard astarboard to turn into Newark Bay Channel. The impact with the mud bank forced the tug's rudder and steering gear to a starboard position beyond their normal stops, and the digging of the propeller into the bank slowed her speed. Pulled along by the line securing her bow to the deck of the "El Salvador" above her starboard beam, and at the same time dragged through the ship's starboard turn, the tug developed a heavy list to port. Having only a one foot freeboard, she took water and,

after the line securing her to the "El Salvador" was cut, quickly capsized. One crewman was trapped on board; two others drowned before rescue arrived.

Marina's attack on these findings as clearly erroneous faces the usual hazards and some additional ones as well. The most critical is the lack of another explanation anywhere near so convincing for the sudden sinking of a tug in calm waters; the much emphasized instability of the "Russell 18", of which more hereafter, was not shown to have been of such moment that it alone could have produced the catastrophe. Judge Weinfeld thus was clearly justified in adopting an explanation consistent with reported facts and backed by expert opinion. The only criticism calling for comment stresses the testimony of an employee of the Port of New York Authority that four buoys on the tug's port side were in 35′ of water—thus making it impossible for the tug to have run aground. But this evidence was contradicted by a tug captain who testified that the buoys lay outside the navigable channel in shallow water and that a tug would touch bottom if it was parallel to a buoy and 30′ away.[1]

Acceptance of the trial court's explanation of the cause of the accident automatically validates the finding of fault on the part of the "El Salvador", with consequent liability to the extent of her limitation fund. However, the important and interesting controversies between Marina and McAllister make it necessary to go further and determine with more pre-

[1] There was also evidence that the motion of the "El Salvador" pushed the water ahead of it in the narrow channel, thereby lowering the level a few inches.

cision the faults attributable to the "El Salvador". These divide themselves into two categories—acts causing the "Russell 18" to strike the mud bank and failure to take action that might have saved her or her crew once she did. Although Skogen, the McAllister pilot who went aboard the "El Salvador", had set a course down the middle of the channel, this evidently was not kept by the helmsman. Skogen, whose attention was centered on trying to locate a missing buoy on the starboard side, conceded he was uncertain whether the prescribed course was being held, and failed to ascertain the distance between the "El Salvador" and the left bank of the channel when he ordered a hard turn to starboard. A serious fault in the second category was the failure of the boatswain of the "El Salvador", who was stationed at the cleat where the tug's line was made fast, immediately to report his observation of the tug listing heavily to port, water going over her, and several of her crew yelling excitedly. Instead of shouting forthwith to the bridge, he ran forward and up a ladder to call the mate who was standing by the anchor at the bow; they then descended the ladder and, with some difficulty, cut the line, still without communicating with the bridge. Only after the line was severed did the master of the "El Salvador" become aware of the situation, and then not from any report but by observing the tug's disappearance from her position in front of the bridge, an observation that he passed on to Skogen. Minutes or even seconds were vital; Skogen testified that if he had been promptly notified of the tug's plight, he would either have put the "El Salvador's"

engines full astern and dropped an anchor or swung the ship hard to port and beached her. By the time Skogen learned the facts, the "El Salvador" had first to stop her propeller to avoid injuring the tug or the men in the water, and then to continue her turn into the Newark Bay Channel to avoid collision with an oncoming tanker.[2] It is unnecessary to pass upon the judge's conclusion that still other faults were committed, since these suffice for disposition of the case.

II.

McAllister does not dispute that if the judge was warranted in finding negligence on the part of its employee Skogen, the standard New York Harbor pilotage clause contained in its contract with Marina[3] would not exempt it from liability to the death claimants. *Pennsylvania R.R.* v. *The Beatrice,* 275 F.2d 209, 213-14 (2 Cir. 1960). However, as we also held in that case, the pilotage clause would entitle McAllister to indemnification from the "El Salvador"

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[2] It was the latter's tugs that rescued the four crewmen who were saved.

[3] "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power, goes on board such vessel, or any other licensed pilot goes on board such vessel, it is understood and agreed that such tugboat captain or licensed pilot becomes the servant of the owner of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, charterers, operators or managers shall be liable for any damage resulting therefrom."

the tug's slight initial list alongside the "El Salvador" or the increasing list thereafter to the chief engineer's failure to maintain the full excess of 1000 gallons in the starboard wing tank and the fuel accumulated in the lazarette.[7] More important, it is altogether plain that no list due to lack of the extra 300 gallons, even as aggravated by the loose fuel, would have driven her against the mud bank. Once the ship caused that to happen and was dragging the tug along with her rudder jammed in an extreme starboard position, this minor imbalance would appear to have had negligible significance in causing the tug to go so far over as to take on water and capsize. The Supreme Court's disapproval of the "broad proposition" that "claims which might be said to touch upon naval architecture can never succeed without expert evidence," *Salem* v. *United States Lines Co.*, 370 U. S. 31, 35 (1962), does not mean that a party can always succeed without it, especially when his adversary has provided some. Left to rely on our "common understanding," *United States Smelting Co.* v. *Perry*, 166 Fed. 407, 415 (8 Cir. 1909), quoted in *Salem* v. *United States Lines Co.*, *supra*, we would suppose that even the most perfectly balanced tug would develop a critical port list if her propeller was digging in mud, her rudder had been broken and shoved hard to starboard, and she was

[7] The testimony as to how much fuel had accumulated in the lazarette was in conflict. Evans, the tug's chief engineer, said the height was 11", a figure which the judge accepted, but estimated the quantity at 100 gallons. Ganly, a naval architect, calculated that, due to the V-shape of the lazarette, 11" would be only 37 gallons or .12 tons. He thought that this would have a negligible effect on the stability of the tug and that the effect of even 100 gallons, equivalent to a height of 20", would be small.

being pulled by a larger vessel turning to starboard at a 7 knot speed. On this basis the faults of the tug, whether characterized as negligence or unseaworthiness, would not constitute a *sine qua non* cause. See Prosser, Torts §41 and cases cited in notes 11-17 (1964); Hart and Honoré, Causation in the Law 103-08 (1959); *Curtis Bay Towing Co.* v. *Southern Lighterage Co.*, 200 F. 2d 33, 35 (4 Cir. 1952).

We find it unnecessary to determine whether, despite these considerations, the rule of *McAllister* v. *United States*, 348 U. S. 19 (1954), would forbid reversal of the finding of causal relationship and the consequent judgment for the death claimants against the tug. Acceptance of the finding still would not dispose of McAllister's right to indemnity from liability to the death claimants and recovery for damage to the tug from the "El Salvador's" sufficient limitation fund. The judge denied this on the basis that, the tug being itself at fault, this was a both-to-blame situation in which her only right would be to contribution on paying more than half the damages. *Petition of Diesel Tanker A. C. Dodge, Inc.*, 282 F. 2d 86, 88-89 (2 Cir. 1960). In our view this ruling failed to take adequate account of the doctrine of the last clear chance, the application of which in admiralty was discussed in *Petition of Kinsman Transit Company*, 338 F.2d 708, 719-21 (2 Cir. 1964), cert. denied, 380 U. S. 944 (1965). We there pointed out that although a third party may be able to recover from both of two persons whose negligence contributed to an accident, the last clear chance doctrine may allow one of these to recover from the other, even under the common law rule

as to contributory negligence. Although stressing that the doctrine had been "utilized in admiralty quite selectively," we recognized it had been applied "to free a claimant from the consequences of a rather low degree of negligence in creating a dangerous situation of which the party whose activity led to the damage was well aware and which he could easily have overcome." We cited as one example a line of cases "where the vessel committing the later fault was contractually bound to care for the one guilty of an earlier fault of which the vessel held solely liable had become aware." *Henry Du Bois Sons Co.* v. *Pennsylvania R.R.*, 47 F. 2d 172 (2 Cir. 1931); *Chemical Transporter, Inc.* v. *M. Turecamo, Inc.*, 290 F. 2d 496 (2 Cir. 1961).

The situation when the "El Salvador's" boatswain and mate learned of the tug's plight reasonably falls within these descriptions. When the boatswain first heard the men yelling on the tug, she was listing about two feet and taking water; by the time he cut the line under the mate's supervision, she was listing three feet and "was taking in a lot of water." The judge accepted the testimony that if the facts had been promptly reported to the bridge, the tragedy would probably have been averted. 248 F. Supp. at 22. Since, with respect to liability to third parties, the pilotage clause entitles McAllister to indemnity from the negligence of Skogen as pilot of the "El Salvador" and the last clear chance doctrine protects it *vis-à-vis* the ship from the consequences of the earlier fault of the tug, the principle of equal division in both-to-blame accidents is inapplicable and the death claims

should be satisfied solely from the "El Salvador's" sufficient limitation fund.

McAllister's claim for damage to the tug up to the balance in the "El Salvador's" fund raises a somewhat different issue. Judge Weinfeld correctly held that the pilotage clause would not entitle McAllister to recover from the "El Salvador" for Skogen's negligence; as said by the Supreme Court, an agreement that one shall not be liable for negligence of a third person "cannot easily be read as an agreement that one is entitled to collect damages for negligence of that third person." *United States* v. *Nielson,* 349 U. S. 129, 131 (1955). But that commonsensible rule does not deprive McAllister of a claim for the negligence of the boatswain and the mate in failing to make prompt report of the tug's peril. Since, as we have held, the last clear chance doctrine insulates McAllister as against the ship from what we have doubtingly assumed to be the causal effect of its fault with respect to the stability of the tug, the ship's only remaining defense depends on Skogen's negligent acts on board her. Under the restricted application of last clear chance in admiralty, McAllister cannot be relieved on that ground from responsibility for acts of Skogen which were the prime cause of the tragedy, see *Petition of Kinsman Transit Company, supra,* 338 F. 2d at 720-21, and we are thus left to consider the pilotage clause, see fn. 3. Although the precise holding in *United States* v. *Nielson, supra,* was that a tug company may not "collect damages for injury to its own tug due to the negligent pilotage by one of its tug captains," 349 U.S. at 131, the rationale of the deci-

sion is that, except for damage to the assisted vessel and to third parties, the pilot remains the servant of the tug owner. Just as the clause may not be invoked by the tug owner to impose liability on the ship for injury to the tug, see *State Marine Corp.* v. *Victory Carriers, Inc.*, 272 F. 2d 463, 469 (9 Cir. 1959), so also it should not be available to cut off an assertion of contributory negligence when the pilot's employer seeks damages for its tug in a case where there was causal fault both by the pilot and by the ship's personnel. On the other hand, we perceive no reason why the pilot's negligence should have a more drastic effect on McAllister's claim than would negligence of the tug itself; the case is appropriate for the admiralty rule of divided damages. McAllister is thus entitled to recover half the damage suffered by the "Russell 18" from the balance of the ship's limitation fund remaining after satisfaction of the death claims.

III.

The only significant point raised by the claimants' appeals from Judge Weinfeld's painstaking computations of their damages concerns a deduction of the federal and state income taxes that he estimated would have been payable by the decedents on future earnings. It is undisputed that claimants' rights against Marina arise under the New Jersey Wrongful Death Act, N. J. Stat. Ann. §2A: 31.1 et seq. and against McAllister under the Jones Act, 46 U. S. C. §688. Counsel appear to agree that New Jersey decisions cast no light on the law of that state with respect to the deduction of income tax from future earnings in computing awards for death or disability.

In *McWeeney* v. *New York, N. H. & H. R.R.*, 282 F. 2d 34, 35-39 (2 Cir.), cert. denied, 364 U. S. 870 (1960), this court sitting *in banc* laid down the rule to be followed on deductions for income taxes "where the question is one of federal law or the applicable state law is silent." 282 F. 2d at 39. We there held that estimated future income taxes should not be deducted in "the great mass of litigation at the lower or middle reach of the income scale, where future income is fairly predictable, added exemptions or deductions drastically affect the tax and . . . the plaintiff is almost certain to be undercompensated for loss of earning power in any event." The undercompensation would arise from the erosion of the recovery due to the failure to award attorneys' fees, almost always high in this type of litigation because of their contingent nature, and to continuing inflation;[8] we noted also that deduction of the income tax on the estimated earnings *simpliciter* took no account of the tax payable on the income from the lump sum awards given to replace them, see *Meehan* v. *Central R.R.*, 181 F. Supp. 594, 623-24 (S. D. N. Y. 1960)—a factor particularly important in death cases, both because the loss of earnings is total and because the income from the lump sum will be taxable without benefit of income splitting unless the surviving spouse remarries. We recognized, however, that in cases "at the opposite end of the income spectrum," failure to deduct for taxes would result in an award that "would be plainly

[8] Using the years 1957-59 as a base period, the purchasing power of the dollar has declined from $1.194 in 1950 to $.971 in 1960 and $.925 in 1964. Statistical Abstract of the United States 1965, p. 365.

excessive even after taking full account of the countervailing factors we have mentioned"; in such cases some appropriate adjustment should be made. Although the exact issue in *McWeeney* was whether a jury should be instructed to make a deduction for income taxes and the opinion relied in part on the difficulties jurors would encounter in doing this, the decision was not so limited. Indeed, as the foregoing summary makes evident, most of the reasons given for the rule there adopted are equally pertinent when the award is by a judge—perhaps even more so since the judge attempts accurate calculations whereas "we know full well that the give and take of the jury room is in round figures and does not deal in actuarial tables, decimal points and percentages." 282 F. 2d at 42 (dissenting opinion of Chief Judge Lumbard). Accordingly we have held *McWeeney* to be applicable where the award was by a judge. *Montellier* v. *United Sattes,* 315 F. 2d 180, 186 (2 Cir. 1963); *Cunningham* v. *Rederiet Vindeggen A/S,* 333 F. 2d 308, 314-15 (2 Cir. 1964).

The *McWeeney* rule, like many a compromise, is not very satisfactory as a solution save in the important sense of being more acceptable than either of the polar proposals. Although the opinion recognized the impossibility of drawing a bright line that would show just when income had reached a level requiring some deduction to be made, it did not leave trial courts wholly without guidance. We said, in a passage previously quoted, that deductions should not be made in "the great mass of litigation at the lower or middle reach of the income scale" and that "the line was not approached" by a bachelor earning $4,800 a year. The

illustrative examples where a deduction would be required were the case of a plaintiff with "potential earnings of $100,000 a year," and the House of Lords decision, *British Transp. Comm'n* v. *Gourmley,* [1956] A. C. 185, where income taxes would have taken 82% of the estimated earnings. The opinion did not suggest that the exception was to be limited to such extreme cases; indeed it has subsequently been held applicable to a physician with anticipated annual income of $16,000 and $25,000. *LeRoy* v. *Sabena Belgian World Airlines,* 344 F. 2d 266, 276 (2 Cir.), cert. denied, 382 U. S. 878 (1965). We see no basis, however, for thinking that workers on tugboats in New York harbor should be considered among those high income earners to which the exception applies. The estimated annual earnings here, $11,000 to $11,500 for Fargo, $9,300 to $10,500 for Salvesen, and $11,000 to $11,500 for Evans, bear more resemblance to McWeeney's $4,800, Montellier's $12,000 and Cunningham's $6,300, all factored upward for subsequent inflation, than to Dr. LeRoy's $16,000 to $25,000 estimated to produce total future income of some $600,000. Death cases, where the deprivation of earnings is certain, would seem particularly poor candidates for extending the deduction.

We therefore direct that the decree be modified by increasing the awards in paragraphs 3, 4 and 5 to restore the sums deducted for taxes on future income; by amending paragraph 6 to grant the claim of McAllister against Marina for half-damages to the "Russell 18" in the sum of $49,191 with interest at 4% per

annum from September 20, 1962, to the date of judgment, subject to limitation and to prior payment of the death claimants out of the "El Salvador's" limitation fund; by eliminating paragraph 8 and providing that upon payment of the death claimants' judgments a decree shall be entered discharging McAllister Brothers, Inc. and the "Russell 18" from all further liability; and by amending paragraph 9 to provide for the payment by Marina into the registry of the Court of the sum of $535,172 with interest at 6% per annum from April 3, 1963, to satisfy the judgments of the death claimants and, subject thereto, the claim of McAllister for half damages to the tug, with leave in the alternative to make direct payment. The death claimants and McAllister may recover costs on appeal against Marina. If the form of decree cannot be agreed upon, it may be settled on five days' notice.

Judgment of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of July one thousand nine hundred and sixty-six.

Present:

HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.

In the Matter of the

Petition of MARINA MERCANTE NICARAGUENSE, S.A., as owner of the Motor Vessel "EL SALVADOR".

MARINA MERCANTE NICARAGUENSE, S.A.,
Appellant.

In the Matter of the

Petition of MCALLISTER BROTHERS, INC., as owner of the Tug "RUSSELL #18".

VIRGINIA RUTH EVANS, et al.,
Appellants-Appellees.

Judgment of Court of Appeals for the Second Circuit

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is modified with costs to the appellees Virginia Ruth Evans, Theresa F. Salvesen, Catherine Marie Fargo and McAllister Brothers, Inc., in accordance with the opinion of this court.

It is further ordered, adjudged and decreed that if the form of decree cannot be agreed upon, it may be settled on five days' notice.

A. DANIEL FUSARO
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

In the Matter of the Petition of MARINA MERCANTE NICARAGUENSE, S.A., as owner of the Motor Vessel "EL SALVADOR", in a cause of exoneration from or limitation of liability,

Petitioner-Appellant.

In the Matter of the Petition of McALLISTER BROTHERS, INC., as owner of the Tug "RUSSELL No. 18" for exoneration from or limitation of liability,

Petitioner-Appellee.

PETITION FOR REHEARING

Cichanowicz & Callan, New York, N. Y.
for Petitioner-Appellant.

Application denied.

P.R.H.
WF
U.S.C.J.J.

August 15, 1966